No. ———

In The

Supreme Court of The United States

October Term, 1957

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THE SUCHER PACKING CO.,
Petitioner,

vs.

MANUFACTURERS CASUALTY INSURANCE COMPANY,
Respondent.

———

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

———

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, The Sucher Packing Co., respectfully prays that a Writ of Certiorari issue to review the order and judgment of the United States Court of Appeals for the Sixth Circuit entered in that court in the above entitled case, affirming the judgment of the United States District Court for the Southern District of Ohio, Western Division, sitting at Dayton, Ohio.

OPINIONS BELOW

The trial court below wrote no opinion. The opinion of the Court of Appeals, copy of which is attached hereto as Appendix B, infra, is reported in 245 F 2d 513. The order of the Court of Appeals on the petition for rehearing is not reported, and copy is attached hereto as Appendix B, p. 30, infra.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit herein sought to be reviewed was dated and entered on the 25th day of June, 1957. The order of the Court of Appeals denying a timely petition for rehearing was dated and entered on October 12, 1957.

Jurisdiction to review said judgment by writ of certiorari is believed to be conferred on the Supreme Court by the provisions of Title 28, U. S. Code, Section 1254 (1).

QUESTIONS PRESENTED

1. Should Rules 46 and 51 of the Federal Rules of Civil Procedure be construed together to obviate the necessity of formal specific exceptions to the actions of a trial court wherein it first allows the introduction of vital evidence, but later rules that it is withdrawing such evidence, and then in special instructions to the jury before argument and in its general charge orders the jury to disregard such evidence, if the party seeking to appeal from such actions has previously repeatedly made his opposing position clear to the trial court?

2. Does a party waive his right to claim error in a trial court's action, where after he makes his position clear to the trial court and is overruled, without further objection he so so modifies special charges previously prepared and so otherwise conducts himself as to conform to the trial court's adverse ruling?

3. (a) Where a witness refuses, under protection of the Fifth Amendment, to testify concerning thefts from petitioner, is a statement made by him to another person, admitting stealing from petitioner, admissible in evidence as an exception to the hearsay rule as a declaration against his pecuniary interest, even though it is also against his penal interest?

b. Does the claim of the Fifth Amendment render a witness sufficiently unavailable so as to make his extra-judicial statement against his pecuniary or proprietary interest, about which he has refused to testify, admissible under the exception to the hearsay rule?

4. Has Rule 61 of the Rules of Civil Procedure changed preexisting law to justify holding non-reversible the exclusion of convincing evidence which directly supports a party's position on principal issues in a case, such as the exclusion, in an action by an employer on an emplloyee fidelity insurance policy, of the confession by an employee that he had been stealing from the employer for five years when the length of time thefts had been going on, the degree of, and length of time of, participation of the employee in question in such thefts were among the principal issues in the case, and where such evidence was needed to support the testimony of another employee whose credibility was strongly attacked and whose testimony was not permitted to be otherwise supported under the trial court's rulings?

5. Is a court justified in excluding evidence because it believes the same unreliable, where such belief necessarily involves weighing the evidence and making resolutions of credibility?

STATUTES AND RULES INVOLVED

Title 28, U. S. Code, Section 2072 (consolidating former sections 723 b, 723 c and other sections) provides for the Supreme Court to establish Rules of Civil Procedure for the United States District Courts. Pursuant to such statutory authorization, the Supreme Court has promulgated such Rules. Involved in Question 1 above are Rules 46 and 51 of such Rules.

Rule 46 provides as follows:

> Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an

exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him."

Rule 51 provides as follows:

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Question 4 involves Rule 61, which provides as follows:

"No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

STATEMENT OF THE CASE

Petitioner has filed with the clerk nine copies of the portions of the record in the trial court printed below, con-

sisting of four appendices in the following order: Appellant's Appendix, paged –a. Appellee's Appendix, paged –b. Reply Appendix, paged –c, and Rehearing Appendix, paged –r. Record references in footnotes hereinafter are to such appendices by their respective page numbers. The footnotes to which the exponential numbers hereinafter appearing refer have, for easier reading of this petition, been placed in Appendix A, beginning at page 26, infra, where they are available if wanted, rather than being interspersed throughout the petition.

The Claim

Petitioner, an Ohio corporation, filed a civil action in the Common Pleas Court of Montgomery County, Ohio against the respondent insurance company, on a "Comprehensive Dishonesty, Disappearance and Destruction Policy," indemnifying petitioner against loss resulting "from larceny, theft, embezzlement, misappropriation, wrongful abstraction, wilful misapplication or other dishonest or fraudulent act or acts * * * by any of the employees acting alone or in collusion with others, * * * and that part of any inventory shortage which the assured shall conclusively prove to have been caused by the dishonesty or fraud on the part of any of the employees * * *." The policy by special provision protected petitioner against loss by dishonesty of unidentifiable employees, respondent's liability being limited to $20,000.00 for each identified employee and to $20,000.00 for losses caused by unidentifiable employees as a class. Although the policy period was three years beginning November, 1947, the claims in suit covered only the period from November 5, 1948, to September 11, 1950, when a ring of employee thieves was caught. The amount sought to be recovered at the time of trial was $146,370.57 with interest.

Federal Jurisdiction

Respondent, being a Pennsylvania corporation and the amount in controversy exceeding Three Thousand Dollars, removed the case to the United States District Court for the Southern District of Ohio, Western Division at Dayton, on the ground of diversity of citizenship.

The Thefts

Petitioner is a substantial meat packer. In 1946 petitioner began to suffer severe losses, but the records then kept by the petitioner did not disclose their source. Beginning in 1948 new and elaborate records, methods and security devices were installed but the unexplained loss continued. By November, 1948, a detailed record keeping system had been fully established which showed the complete disposition of petitioner's products from slaughter to sale, with weights taken in every step of the process[1]. These records showed a continued disappearance of product for which there was no explanation in the honest course of business[2]. For the 47 week period ending October 22, 1949, pork products and sausage of at least 263,257 pounds, valued at $103,279.00, disappeared; for the 45 week period ending September 9, 1950, at least 126,654 pounds valued at $43,229.50, disappeared[3].

On September 11, 1950, petitioner's superintendent noticed a new barrel being used on the trash truck, when only old barrels were to be so used. Upon investigation, he found smoked hams in barrels under a layer of trash, and fresh shoulder butts under papers on the floor of the truck[4]. The trash truck driver, William Harris, was seized[5], confessed, and implicated four other employees, Jackson, Maiden, Hurt and Early, in thefts covering approximately a two year period[6]. Harris had been the regular trash truck driver only since July, 1950, but had been a spot laborer more or less regularly for about two years[7]. Jackson, Maiden

and Hurt had been regularly employed for years at the company, but Early for only a few weeks[8]. Harris and Jackson pleaded guilty, and were convicted and sentenced for grand larceny[9]. The record is silent as to the others.

At the time of his apprehension Jackson admitted to a private detective, Merica, that he had been stealing from the company for five years, but when called as a witness in the trial court, he refused to answer on the basis of the Fifth Amendment[10]. The petitioner then called Merica to the stand and attempted to have him testify as to this confession, as a declaration against the pecuniary or proprietary interest of Jackson but the trial court, in spite of many legal authorities submitted by petitioner, refused to admit such evidence indicating that he (the trial court) understood the exception to the hearsay rule to apply only to admissions of parties to the litigation[11].

Harris, when called as a witness, freely admitted that through Jackson he started stealing from company as part of the ring in 1948[12]. That until he became the trash truck driver a few weeks before his apprehension he helped the others load the barrels with stolen meat; that almost daily as many as three truck loads of four to five trash barrels filled with fresh pork shoulders, hams and sides of bacon were taken, sold and the proceeds divided among the confederates, the loaders and the drivers[13]. He also testified that daily he saw almost one-third of petitioner's employees whom he did not know by name, take sausage and pork loin cuts and put them in their pockets[14].

Petitioner's Records

Upon apprehension of the ring, petitioner notified respondent, and also employed a firm of certified public accountants to attempt to ascertain the amount of the loss. At the trial, the accountants testified as to the loss, using as a basis, weekly summaries (product analysis sheets) of petitioner's detailed records[15]. These records reported the

weights of the products, fresh pork, smoked pork, sausage, etc., at every stage of its processing, all slaughtering weights, all purchases, sales, all transfers between departments, as well as opening and closing inventories, with proper allowances for weight shrinkage due to evaporation, smoking and cutting losses[16]. These detailed records and the weekly summaries (product analysis sheets) based thereon showed the complete disposition of all petitioner's products in the honest course of business, and showed a substantial disappearance of product for which there was no explanation in the honest course of business[17]. Petitioner's witnesses testified that these records were accurate, and that any errors or approximations which might appear therein, on accounting and actuarial principles, would have only a negligible effect on the accuracy of the resultant loss shown[18].

Action of the Trial Court and Petitioner's Counsel

These weekly summaries and voluminous detailed records for the period from November, 1948 to September, 1950 were first admitted in evidence by the trial court without objection and referred to by the trial court as "inventory shortage" evidence[19]. Petitioner from the outset contended that these records and computations made therefrom were offered to corroborate the direct evidence of theft from Harris' testimony and would help fix the amount of the loss, as without the benefit of such figures, the jury would have great difficulty in arriving at the damage suffered by petitioner with any degree of exactitude from Harris' testimony alone[20]. This contention was supported by two separate briefs submitted to the trial court during the trial, covering the admissibility, purpose, importance and persuasive character of such evidence[21]. At the close of the plaintiff's case and again at the close of all the evidence upon arguments on respondent's motions for a directed verdict, petitioner's

counsel repeatedly urged the same contentions on the trial court and also insisted that petitioner was entitled to recover for loss by unidentified employees[22], but the trial court ruled at the conclusion of the latter argument that it was withdrawing all such evidence of both kinds from the jury's consideration[23]. Counsel for petitioner thereupon advised the trial court that he would have to revise the special charges which he had prepared in order to comply with the court's rulings, and presented them to the trial court after being so modified[24].

The trial court then gave special instructions to the jury before argument incorporating his rulings withdrawing the "inventory shortage" evidence from their consideration and withdrawing the issue of loss from theft by unidentifiable employees from the case[25]. In his general charge he again repeated his ruling that the "inventory shortage" evidence was to be disregarded[26]. Counsel for petitioner took no formal exception when the trial court announced his rulings at the close of the argument on the motion for a directed verdict, or when the court gave its special instructions to the jury incorporating such rulings before final summations. At the close of the general charge, however, counsel for petitioner did specifically except to the exclusion of the records[27].

Other Errors

The trial court committed numerous other errors to the prejudice of petitioner but in the interest of brevity they will not be discussed in the body of this petition[32].

The Verdict and Judgment

The trial court submitted the case to the jury upon a form of special verdict which required the jury to decide the dates and times of, and participants in, any dishonest acts, the numbers of hams, shoulders and bacons, if any,

taken through the dishonesty, if any, of each of the five named employees, and the approximate weight in pounds of each item[28]. Counsel for petitioner excepted to the degree of specificity required by the form of the special verdict[29]. The jury after being out six hours found that it was unable to state the number of pounds of the various types of pork stolen[30], and that there was insufficient evidence to find Maiden, Hurt and Early guilty[31].

The trial court entered judgment for petitioner for $83.00 (with interest and costs), being the approximate difference between $291.14, the value of specific pieces of stolen meat traced to the hands of their purchasers by respondent after Harris' apprehension and the $208.00 in wages withheld by petitioner from Harris, Jackson, Maiden, Hurt and Early, even though petitioner would still be liable for the wages withheld from Maiden, Hurt and Early, if they were not guilty.

Petitioner's motion for a new trial was overruled.

Rulings by The Court of Appeals

On appeal to the Court of Appeals, the judgment was affirmed, the court holding that the failure of counsel for petitioner to except to the judge's instructions before final summations withdrawing the "inventory shortage" evidence was a waiver of the right to claim error in regard thereto under Rule 51, and that the specific exception taken to the similar portion of the general charge was not clear enough.

The Court of Appeals then held that because counsel for petitioner had submitted a requested special charge to the trial court which sought to relieve petitioner from the burden of conclusive proof required by the policy for losses proved by inventory shortage alone, petitioner had waived the right to complain of the trial court's instructions withdrawing all "inventory shortage" evidence.

The Court of Appeals also ruled that because petitioner's counsel had not made a formal objection to the withdrawal by the trial court of the issue of loss from thefts by unidentifiable employees and had thereafter complied with such ruling, any possible error in this regard was waived under Rule 51.

The Court of Appeals further decided that the refusal of the trial court to admit the declaration against interest of Jackson as to his role in the thefts, whether erroneous or not, would not be reversible error.

Although the Court of Appeals expressly stated it was not deciding whether petitioner was entitled to have the "inventory shortage" records go to the jury as corroborating evidence to the direct evidence of theft since it had held that any possible error in regard thereto had been waived, it did seriously disparage the persuasive quality of such corroborating evidence. Petitioner contends that the weight and credibility to be accorded such evidence was for the jury, not the court. To avoid unduly lengthening this petition a special note discussing this point has been included at the end of Appendix A, if this Court should wish to read it.[47]

REASONS FOR ALLOWING THE WRIT

CONFLICT WITH OTHER CIRCUITS

Conflict on Question 1

The decision in the Court of Appeals below with respect to the extent to which Rule 46 and Rule 51 of the Federal Rules of Civil Procedure should be construed in pari materia, as posed in Question 1, is in direct conflict with decisions of the Court of Appeals for the Second Circuit in *Keen* v. *Overseas Tankship Corp.*, 194 F. 2d 515, 519 (CA 2, 1952), cert. den. 343 U.S. 966, 72 S. Ct. 1061, 96 L. ed. 1363, and *Troupe* v. *Chicago, Duluth and Georgian*

Bay Transit Co., 234 F. 2d 253, 258-9 (CA 2, 1956), on exactly analogous fact situations.

It also conflicts on Question 1 with the decision of the Court of Appeals for the District of Columbia in *Harlem Taxicab Association* v. *Nemesh*, 191 F. 2d 459, 461 (CA DC, 1951), on what appear to be anologous facts, and in principle with decisions of the Court of Appeals of the Third, Seventh and Eighth Circuits and with an earlier decision of the Sixth Circuit itself in the following cases: *Green* v. *Reading Co.*, 183 F. 2d 716, 719 (CA 3, 1950); *U. S.* v. *General Motors Corp.*, 228 F. 2d 745, 750 (CA 3, 1955); *Irvin Jacobs and Co.* v. *Fidelity & D. Co. of Maryland*, 202 F. 2d 794, 800-801 (CA 7, 1953); *Hower* v. *Roberts*, 153 F. 2d 726, 729 (CCA 8, 1946); *Williams* v. *Powers*, 135 F. 2d 153, 156 (CCA 6, 1943).

In spite of the fact that petitioner had made its position clear to the trial court, by two separate legal memoranda and extended oral arguments, that it was offering its product disposition records (loosely referred to as "inventory shortage" records because they did show inventory shortages), not so much for the purpose of proving by themselves inventory shortage losses under the inventory shortage provisions of the policy, but rather as corroborating evidence to the direct evidence of theft by Harris, one of the thieves, and to assist the jury in arriving at a more accurate estimate of the amount of the loss both from identified and unidentified employees, and that the evidence was not only admissible but convincing, and although the records had previously been admitted without objection, the trial court, after stating that he understood petitioner's position[33], specifically overruled petitioner by ruling that he was withdrawing the records and also the entire issue of loss from thefts by unidentified employees[34]. He then incorporated his rulings in his special[35] and general charges[36]. Petitioner did not take formal exception to the rulings or to the special instructions. It did except to the general charge

The Court of Appeals below held that Rule 51 required specific objections to instructions; that although Rule 46 made exceptions during the trial no longer necessary, it did not relieve a party from excepting to instructions, and that since petitioner did not except to the instructions, the questions raised were not saved for review.

Indeed, the Court of Appeals was so firm in this view that it held that even a statement by the trial judge early in the case, when petitioner excepted to one of his rulings, that "exceptions are not necessary",[36a] did not help petitioner. The Court of Appeals went still farther and held not specific enough the exception which petitioner took to the general charge, which included the following[37]:

> "Also take exception at this time to the exclusion of the matter of the book figures which was the result of your Honor's earlier decision; in your instructions it was repeated, they were not to be considered (.) in describing the inventory shortage evidence."

While not a model of syntax, this extemporaneous exception did refer to the trial court's earlier decision excluding the records for any purpose, and could not have been understood by the trial court to have had any other meaning, especially in view of the constant reiteration of petitioner's position as to such records during the trial. The Court of Appeals held nevertheless that Rule 51 was not satisfied.

In the *Keen* case in the Second Circuit, a crew member sued the ship owner for injuries from an attack by a fellow crew member. Plaintiff sought to prove that the fellow crew member was temperamentally unfit for duty and his counsel argued that it made no difference whether the defendant knew it or not. The trial judge advised counsel that in his view such unfitness was not a ground of liability unless it had come to the defendant's knowledge. The

judge later so charged the jury. Petitioner's counsel did not except either to the ruling or the charge. The Court of Appeals through Judge Learned Hand ruled that the error was nevertheless preserved, saying at 194 F. 2d 519:

> "It is indeed true that plaintiff did not except to that ruling, any more than to the charge; but he had made his point clearly, the judge had overruled him * * * and these circumstances satisfied Rule 46. * * * Moreover, the plaintiff's failure later to repeat the objection or to conform literally to Rule 51, was not a 'waiver' of the ruling against him * * *. The notion is wholly untenable that in order to protect himself against an imputed surrender, a party must reassert what has been overruled every time the occasion comes up again."

In the *Troupe* case there were two issues and motions for directed verdict as to both were made at the close of plaintiff's case and again at the close of all the evidence. After hearing plaintiff's argument in opposition, the trial court overruled both motions, but later apparently changed his mind and charged one issue out of the case. No exception was taken. The Court of Appeals for the Second Circuit ruled that even though the action of the trial court was incorporated in its instructions it was in effect a delayed ruling on the exclusion of one issue; that such rulings are governed by Rule 46 rather than Rule 51, that therefore no exception was necessary since plaintiff's position had been made clear to the trial court.

The case at bar is exactly analogous. After having first admitted the "inventory shortage" evidence and the evidence of loss by unidentifiable employees, and after petitioner's position with respect thereto was made very clear to the trial court, the trial court changed his mind, ruled out all this evidence, and instructed the jury to disregard it. Under the *Troupe* case, the actions of the trial court here were rulings on the evidence within the purview of

Rule 46, and petitioner's position having been made clear to the trial court, no objections to the trial court's instructions incorporating his rulings, under Rule 51, were necessary.

From the foregoing it is clear that the decision below directly conflicts on Question 1 with decisions of the Second Circuit under exactly analogous facts in the *Keen* and *Troupe* cases. The conflict below with the *Harlem Taxicab Association* case in Court of Appeals for the District of Columbia, above cited, is also direct, although the facts in the latter case on the point are not quite so clear. The conflict with the decisions in the other Circuits above cited is in principle because in those cases the Courts of Appeals held it was not necessary to take exceptions to the trial judge's instructions, but in each case the appellant's position had been made clear through proffered requested instructions which the judge refused.

Conflict on Question 2

The decision below on Question 2 herein is directly in conflict with the Court of Appeals for the Second Circuit in the *Keen* case, supra.

After the trial court in the case at bar ruled that it was withdrawing the "inventory shortage" evidence and the issue of loss from thefts by unidentified employees, petitioner's counsel advised the court that he would have to revise special requested instructions which he had previously prepared in order to comply with the judge's rulings.[38] As the court had ruled out all "inventory shortage" evidence, counsel wanted to be sure that the jury understood that petitioner was only required to prove its case by a preponderance of the evidence and not by conclusive proof, which the policy required for loss proved by inventory shortage alone; so petitioner's counsel presented a revised requested instruction to that effect to the judge.[39] This request was overruled by the judge.[40] Also after the

judged ruled that he was excluding the issue of loss from unidentified employees, petioner's counsel did not pursue that claim, which included all of the sausage portion of the total claim, and tried to explain the elimination of the sausage portion of the claim to the jury with as little damage to his client as possible in the eyes of the jury.[41]

The Court of Appeals below ruled that by presenting the revised special charge in question and by complying without objection with the trial court's ruling excluding the issue of loss from unidentified employes, petitioner waived its right to claim error in the judge's rulings. It apparently made no difference to the Court of Appeals that the trial judge refused the special instruction on the ground that, as he had previously announced, he was going to take "away from the consideration of the jury the matter of attempting to determine any damages by virtue of inventory shortage."[42]

The Court of Appeals of the Second Circuit speaking through Judge Learned Hand, took exactly the opposite view in the *Keen* case, supra, when it said at 194 F2d 519:

> "Moreover, the plaintiff's failure later to repeat the objection, or to conform literally to Rule 51, was not a 'waiver' of the ruling against him: *he had taken his position, had lost, and he was free thereafter to win a verdict if he could within the narrower borders of the case that the judge had laid down for him.* Nothing goes further to disturb the proper atmosphere of a trial than reiterated insistence upon a position which the judge has once considered and decided." (emphasis added)

This language is clearly in conflict with the ruling of the Court of Appeals below. In submitting the special charge on the degree of proof and in not pursuing the claim of loss from unidentified employes after the judge's rulings against it, petitioner acted just as Judge Hand said was his right: "he had taken his position, had lost," and was

attempting thereafter to win a verdict if he could within the narrower borders of the case that the judge had laid down for him."

This Court, it is respectfully urged, should resolve the conflict between the Circuits on Questions 1 and 2 herein.

IMPORTANCE OF THE QUESTIONS — NEED FOR DECISIONS BY THIS COURT

The questions raised by this petition are very important questions of federal law which have not been but should be settled by this Court.

Question 1

Since by law this Court prescribes the Federal Rules of Civil Procedure, any uncertainties in their meaning should be resolved by this Court.

Rule 46 says no exceptions are required where a party's position has been made clear to the trial court. Rule 51 says objections are required to instructions so that a party's position is made clear to the judge, but is silent as to whether they are required if a party's position has already been made clear to the judge on the point raised. Where in a trial does Rule 46 end and Rule 51 begin? Do they overlap so that they should be construed in pari materia to obviate the necessity for objections to instructions if the complaining party has previously made his position clear to the trial court and been overruled? The Court of Appeals below said, "No"; other Circuits, as indicated say, "Yes." But regardless of this conflict among the Circuits, it is apparent without further discussion that the question is obviously of prime importance to all lawyers and judges in the federal courts.

In the interest of the orderly administration of justice and uniformity of operation under these Rules, this Court should take this opportunity to eliminate the conflict and

uncertainty in meaning of Rules 46 and 51, caused by the decision below, and make a definitive pronouncement as to the extent to which they should be construed in pari materia.

Question 2

This question is really a corollary of Question 1. Even without the conflict between the Second Circuit and the Sixth Circuit below, Question 2 is definitely also one of great interest to the bar and bench alike in the federal courts.

Even though a party has taken a position and is overruled, if thereafter he conforms to the judge's ruling, without further objection or exception, in the form of special charges submitted or other action taken, the Court of Appeals below holds he has acquiesced to the point of having waived his right to appeal from such ruling. This would certainly seem to be contrary to the apparent intent of Rule 46.

To settle the uncertainty caused by the decision below as to what is required to preserve points for review, as posed by Question 2, and the effect of Rule 46 on the same, a decision by this Court is necessary.

Question 3

(a) Does DONNELLY v. U. S. Apply to Jackson's Admission to Merica?

When this Court over forty years ago decided *Donnelly v. United States*, 228 U.S. 243, 33 S. Ct. 449, 57 L. ed. 820 (1913), its ruling that a declaration against a penal interest was not admissible as an exception to the hearsay rule was the subject of a very vigorous, and, we say most respectfully, devastating dissent by Mr. Justice Holmes in which Mr. Justice Hughes and Mr. Justice Lurton joined. It was likewise severely criticised by text writers. As pointed out by Dean Wigmore in his work in Evidence, 3rd Edition, Sec-

tions 1476 and 1477, for nearly 200 years English Courts had treated as admissible a declaration which constituted an admission of a crime, but in 1844 the House of Lords in the *Sussex Peerage* case, 11 Cl. & F. 109, without considering prior precedents and giving no logical basis therefor, announced the rule that such a declaration could not be received as a declaration against interest. Yet, as stated by Wigmore, this Court based its decision in *Donnelly* solely on the English cases which followed the *Sussex Peerage Case*.

Both Mr. Justice Holmes and Wigmore pointed out how illogical it was to exclude an admission of a crime as a declaration against interest, since there is even less likelihood that a person will falsely confess to a crime than that he would make a false declaration against his mere proprietary or pecuniary interest.

Many courts have refused to follow *Donnelly*, or have held that it does not apply in civil cases, or that a declaration against a pecuniary or proprietary interest does not lose its admissibility even though it should also be against the penal interest of the declarant.

G. M. McKelvey Company v. *General Casualty Company*, 166 O.S. 401, 142 NE 2d 854 (1957); *Sutter* v. *Easterly*, 354 Mo. 282, 189 SW 2d 284 (1945); *Clark & Jones Inc.* v. *The Amer. Mut. Cas. Ins. Co.*, 112 F Supp. 889 (D.C. ED Tenn. 1953); *Newberry* v. *Commonwealth*, 191 Va. 445, 61 SE 2d 318 (1950); *Citizens National Bank of Los Angeles* v. *Santa Rita Hotel Co.*, 22 F2d 524 (CCA 9, 1927); *Webber* v. *Chicago R. I. & P. Ry. Co.*, 175 Iowa 358, 151 NW 852 (1915); *Truelsch* v. *N. W. Mut. Life Ins. Co.*, 186 Wis. 239, 202 NW 352 (1925); *Brennan* v. *State*, 151 Md. 265, 134 A. 148 (1926). See also *American Law Institute Model Code of Evidence*, Rule 509 (1).

In the case at bar, Jackson's admission to detective Merica that he had been stealing from the petitioner for

five years was certainly against his pecuniary interest because he was liable civilly to petitioner for what he had stolen, and his declaration should have been admitted. Although most of the cases cited above were cited to the trial judge[43] he adhered to his ruling excluding the evidence.[44] It is submitted that such exclusion was very prejudicial error.

In view of the lapse of over forty years since *Donnelly* was decided, the severe criticism to which it has been subject, the action of so many courts and authorities in refusing to follow it or in distinguishing it, and the prevailing opinion that it was wrongly decided in the first place, *Donnelly* should be overruled, or at least these questions should be answered authoritatively by this Court for the guidance of the federal courts and those who practice there: Is *Donnelly* still to be followed? If so, does it apply to civil cases, or does it apply if the declaration sought to be introduced is against the pecuniary interest of the declarant as well as against his penal interest?

(b) Does Claiming the Fifth Amendment Make a Witness Unavailble?

A sub question under the main part of Question 3 is whether the refusal to answer under protection of the Fifth Amendment makes a witness sufficiently unavailable so as to render his extra-judicial declaration against his pecuniary interest admissible under the exception to the hearsay rule.

This question has been answered in the affirmative in the only cases which petitioner has been able to find on the point. They are *Sutter* v. *Easterly* supra, *Moore* v. *Metropolitan Life Ins. Co.* (Mo. App.) 237 SW2d 210, 212 (1951) and *Newberry* v. *Commonwealth*, supra.

One of the elements necessary to qualify a declaration against interest as admissible as an exception to the hearsay

rule is that the declarant must be unavailable as a witness by reason of death, absence from the jurisdiction or otherwise not amenable to compulsory attendance at the trial. All the cases just cited take the view and logically so that a refusal to testify under protection of the Fifth Amendment makes a person equally as unavailable as a witness as if he were dead or otherwise beyond the jurisdiction of the court.

This additional aspect of the Fifth Amendment as applied to federal court practice is peculiarly within the province of this Court to decide. With the heightened interest in the Fifth Amendment and its probable greater frequency of use, this important question of a basic rule of evidence as applied to the federal courts should be settled by this Court.

The Court of Appeals below, after discussing Question 3, left the ultimate answer undecided and left standing the decision of the District Court excluding the evidence, ruling that whether or not the exclusion was error, it was not reversible under Rule 61 of the Federal Rules of Civil Procedure. This leads to a discussion of Question 4.

Question 4

Has Rule 61 Changed The Harmless Error Doctrine Under Previously Existing Law?

This Court has not as yet construed Rule 61 of Rules of Civil Procedure. The notes of the Advisory Committee on the Rules indicate that it is a restatement of the previously existing law on harmless error.

Prior to the adoption of Rule 61 this Court has on a number of occasions defined the principles which determine whether error is harmless or not. In *Williams v. Great Southern Lumber Company*, 277 U.S. 19, 26, 72 L. Ed. 761, 767, 48 S. Ct. 417 (1928), this Court held the exclusion of material evidence to be prejudicial and said:

> "Since the passage of this act (28 U.S. Code 391, the former harmless error statute and forerunner to Rule 61), as well as before, an error which relates not to merely formal or technical matters, but to the substantial rights of the parties is to be held a ground for reversal unless it appears from the whole record that it is harmless and did not prejudice the rights of the complaining party."

To the same effect, *McCandless* v. *United States*, 298 U.S. 342, 56 S. Ct., 764, 80 L. Ed. 1205 (1936).

In an earlier case, *Crawford* v. *United States*, 212 U.S. 183, 203, 53 L. Ed. 465, 473, 29 S. Ct. 260 (1909), this Court held, in ruling that an exclusion of corroborating evidence in that case was prejudicial:

> "There is a presumption of harm arising from the existence of an error committed by a trial court against the party complaining in excluding material evidence on a trial, especially before a jury. It is only in cases where the absence of harm is clearly shown by the record that the commission of such an error against the party seeking to review it is not cause for the reversal of the judgment."

In *Kotteakos* v. *United States*, 328 U.S. 750, 90 L. Ed. 1557, 66 S. Ct. 1239 (1946), this Court ruled that it is not enough to render an error at a trial harmless for the Appellate Court to be convinced of the justice of the result, but the Appellate Court must be convinced that the jury would not have been affected by the error (328 U.S. 764). This Court laid down the rule to be applied as follows (328 U.S. 365):

> "But, if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected."

The Court of Appeals, however, construed Rule 61 contrary to the preexisting law of "harmless error" as laid down by the decisions of this court.

The Court of Appeals held that Rule 61 rendered the exclusion of Jackson's confession harmless because it felt that substantial justice had been done in view of its opinion (1) that there were various instances of losses, (2) that there were many errors in petitioner's computations and deficiency in proof as to what was stolen and how much, and (3) the jury's refusal to attach credit to petitioner's evidence of losses of hundreds of thousands of pounds. All but the last of these reasons are based on the Court of Appeals' low estimate of the persuasive character of the "inventory shortage" evidence which was excluded and, therefore, could not have been considered by the jury; as to the last reason given by the Court of Appeals, it must not be forgotten that the jury only found that there was insufficient evidence to determine the number of pieces or number of pounds of each kind of meat that was stolen[45] and the sole reason for the insufficiency of the evidence was the exclusion by the Court of the records which would have given the jury the necessary figures. Thus, all the reasons given by the Court of Appeals were based not on evidence which the jury considered but on excluded evidence which the jury was not permitted to consider.

In the case at bar, the question to be decided is whether any substantial right of petitioner was adversely affected by the exclusion of Jackson's confession. Unless Rule 61 is to be given a different interpretation from the law as laid down in the *Kotteakos* and other cases above cited, then the Court of Appeals' interpretation is wrong. It based its conclusion on its own opinion of the justice of the result instead of using the possible effect on the jury as a yardstick. To make matters worse, all of its reasons

were based on its consideration of other ("inventory shortage") evidence which had been excluded from the jury. No one knows how much weigth or credit the jury would have given that excluded evidence, regardless of how little the trial court or the Court of Appeals may have thought of it, because the jury was not permitted to consider it at all.

The trial court instructed the jury that petitioner's case rested entirely on Harris' testimony and then, in effect, told the jury that Harris was unworthy of belief. Under such circumstances, any support for Harris was vital to petitioner. For example, the only evidence of Jackson's complicity outside of Harris' testimony was his formal plea of guilty of theft on the one day of September 11, 1950 and the jury consequently found in the special verdict that Jackson's thefts were confined to September 11, 1950. If the jury had been permitted to consider Jackson's admission that he had been stealing for five years from petitioner, in all likelihood the jury would have found that Jackson had been stealing from the petitioner for the entire period of the claim instead of merely on September 11, 1950. It is even quite possible that if Harris' testimony had been buttressed by the Jackson admission, the jury might have been willing to believe Harris' testimony with regard to Maiden, Hurt and Early. Since the employment records showed that Jackson had been working for petitioner for more than five years,[46] with Jackson's admission in evidence, there would have been much more plausibility to Harris' statement that the ring headed by Jackson had been in operation for at least two years, and the jury would probably have so found.

In view of the fact that this Court has not yet construed Rule 61 and that the Court of Appeals has construed that rule contrary to the principles for determining harmless error as laid down by previous decisions of this Court, it is very important in the administration of justice and to all

who preside and appear in the federal courts that this Court settle the true intent and meaning of Rule 61.

Question 3

Although the trial court decided this question against petitioner, the Court of Appeals found it unnecessary to rule on it because of its decision on Questions 1 and 2. Therefore the same will not be argued in this petition, but petitioner hopes the same may be presented should this petition be allowed.

CONCLUSION

As the decision of the Court of Appeals below on Questions 1 and 2 herein are in conflict with other Circuits and as the decision below raises questions of the proper interpretation of Rules 16, 51 and 61 of the Federal Rules of Civil Procedure as well as important rules of evidence in the federal courts, which this court has not settled and should settle, it is respectfully urged that this petition for certiorari be allowed and upon such allowance the judgment below be reversed.

Respectfully submitted,
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APPENDIX A

Footnotes

1 24, 25a, 26a, 33a, 34a
2 Pltf's. Ex. 6, 231a, 30a, 33a-39a, 82a-86a, 92a, 113a-114a, 117a
3 Pltf's. Exhibits 6, 21 and 26, 231a, 241a and 242a
4 142a
5 143a
6 17a, 18a, 22a, 134a
7 17a, 141a, 215a-216a
8 22a, 149a
9 12a, 50a
10 16a, 135a
11 13r, 14r-19r, 134a-135a, 156a
12 17a
13 17a, 18a, 19a, 20a, 21a
14 19a-22a
15 32a-39a, 117a, 34a-39a, 243a
16 26a, 27a-29a, 34a, 45a, 51a, 52a, 53a, 54a, 55a, 57a-58a, 82a, 98a, 103a, 104a, 136a, 137a, 138a, 139a, 147a, Pltf's Ex. 6, 231a
17 30a, 68a-69a, 77a-78a, 84a, 113a-114a
18 27a, 59a, 60a, 62a-63a, 64a-66a, 73a-75a, 76a-77a, 86a-87a, 96a-97a, 99a, 100a-101a, 111a, 120a, 122a-123a, 124a-125a, 139a-140a, 143a, 8c
19 59a, 63a, 159a
20 1r, 4r, 5r, 6r, 13r, 20r, 24r, 25r, 40r, 41r, 50r, 51r
21 1r-5r, 5r-13r
22 20r-38r, 38r-52r
23 55r
24 56r, 198a-202a
25 209a
26 214a
27 224a
28 8a-14a
29 224a
30 Paragraphs (8) on 10a, 11a
31 Paragraphs (7) on 12a, 13a, 14a
32 The trial court charged the jury that petitioner's case rested almost solely on Harris' testimony and said in effect Harris was unworthy of belief (215a). The charge disparaged Harris' implication of Maiden, Hurt and Early in the thefts and erroneously stated Harris' testimony on that subject. Harris, after first stating that Maiden, Hurt and Early were "involved" with him, then elaborated by stating that their involvement consisted of doing the same thing that he did, to wit, loading the barrels, (48a) yet in its charge the court stated that Harris had merely said that they were "involved" with him, that this was a conclusion and did not have much meaning, (216a) even though Harris had amplified the use of the word "involved" by stating what the others actually did.

Furthermore, the trial court refused to permit the petitioner to comment on respondent's failure to offer the written statement with which the respondent had sought to impeach Harris, (212a, 199a-200a, 202a, 226a, 227a) and likewise refused to permit petitioner to defend itself against the charge and that defendant should have introduced statements by Maiden, Hurt and Early, although petitioner could not have properly done so (Instruction No. 3, 200a, 203a, 226, 227a) since they were available as witnesses and could

have been called by respondent had it chosen to do so. The trial court also suggested, unfairly it is most respectfully submitted, that petitioner had supressed employment records by referring to the fact that petitioner had disposed of old time cards. (216a) But omitted to state that this was after a check by the Wages and Hours Division of the Department of Labor and that at that time there was no further need to retain time cards. (101a-103a) since no question had then been raised by the respondent as to the periods of Harris' employment. The trial court also refused to permit petitioner reasonable cross examination of respondent's principle witness or to impeach that witness by confronting him on cross examination with prior contradictory statements made by him earlier in the trial, the trial court ruling that prior contradictory statements could be used only to impeach when made outside the trial. (189a) The trial court also refused a number of requested charges submitted by petitioner on the burden of proof, (201a-202a, 204a) the right to comment upon Jackson's refusal to testify (225a, 227a) and on the requisite proof to establish damages. (201a, 202a)

35 At the conclusion of the argument on the motion for directed verdict at the close of all the evidence the trial court, after making several references to petitioner's legal memoranda, said:

> "I take it that the Court is justified at this point in accepting that as plaintiff's theory that he is proceeding upon a matter of establishing direct theft and using the inventory (shortage) as corroborating evidence." (53r)

34 The trial court, after hearing all the arguments on the motion for directed verdict at the close of all the evidence, and after stating that it understood petitioner's position that it did not help petitioner to offer the records as corroborating evidence, but before any requested instructions were submitted, made his ruling as follows (55r):

> "It is the ruling of the Court, so far as the inventory shortages is concerned, that it shall not be submitted to the jury for the jury's consideration in arriving at any damages for the plaintiff. Secondly, the Court will not submit to the jury any question upon the matter of damages for loss sustained by unidentified employes for there is no basis upon which such a determination could be made."

35 209a
36 214a
36a 2c
37 224a
38 After the judge had announced that he was ruling out "the inventory shortage" evidence and the evidence on the issue of loss from theft by unidentified employees and before any special charges were submitted to the court, petitioner's counsel stated as follows (56r):

> "Your Honor, I had prepared some special charges. In view of your Honor's statement I could not offer a number of these. I wonder if I could be permitted to revise them overnight."

The Court replied:

> "I don't know whether counsel for the defense have any or not. If you do, I would like to meet with counsel at 9:30 and receive those."

39 Instruction No. 8, 201a-202a
40 204a
41 After making his rulings excluding inventory shortage evidence and the issue of loss from unidentified employees the trial court said (55r):

> "The exhibits too, I think should be separated and only those exhibits that would have a bearing on the case, aside from the

the matter of the inventory shortage should go to the jury."
"Of course, the arguments will be limited to the issues which I have indicated are proper to go to the jury."

42 204a

43 13r, 14r-19r

44 134a-135a, 156a

45 Paragraphs (8) on 10a and 11a

46 149a

47 The Court of Appeals as the basis for its disparagement of the persuasive character of the petitioner's product disposition ("inventory shortage") records adopted the respondent's claims that those records were unreliable because the shortages might be due to: (1) Errors in weekly inventories. (2) Errors because transfers between departments were in round numbers. (3) Spoilage. (4) Mistakes. (5) Insufficient allowance for natural shrinkage, and (6) No allowance for additional shrinkage over weekends. Petitioner's witnesses, expert and factual, disposed of each and everyone of these contentions. They stated:

1. That the accuracy of weekly inventories were immaterial because any possible errors therein cancelled each other out mathematically as the closing inventory for one week was the opening inventory for the following weeks. Further, that any possible error in the opening or closing inventory for an entire accounting period would have only a negligible effect on the results because they would be so small compared to the tremendous flow of products through the plant during the period (59a, 60a, 63a, 64-66a, 73-75a, 76-77a, 86a-87a, 96-97a, 100a, 101a, 120a, 122a, 123a, 8c);

2. Actually round numbers used on transfers produced no appreciable error in the results because first that was universal practice in the industry; second they were very close to being mathematically accurate and finally because of the thousands of transactions involved, any "overs" would balance out "unders" with no appreciable resultant net error. (27a, 62-63a, 66a, 99a, 111a, 124a-125a, 139a-140a, 143a);

3. Spoilage was not a factor because spoiled products were not destroyed; they were transferred to lard or tankage and in either case a record was kept and proper credits given (27a-28a, 70a, 92a, 25c, 29c-30c);

4. There was no evidence of any uncorrected mistakes. Even respondent's own auditor, who spent weeks going over petitioner's records, found not even a single mistake (177a-178a). Petitioner's auditor was likewise satisfied. (19c-20c);

5. Petitioner made more than adequate allowance for natural shrinkage (29a, 53a, 57-58a, 103a, 136a, 147a, 231a, 241a, 242a), even respondent's auditor admitted that petitioner allowed almost 1,000,000 pounds for natural shrinkage of fresh pork and almost 200,000 pounds for natural shrinkage of sausage alone (172a, 173a, 175a);

6. The time products held over weekends (from Saturday to Sunday evening when petitioner shipped out), was considered in the natural shrinkage allowance made by petitioner. Also, an additional stay in petitioner's cooler over weekends was more than compensated by taking a natural shrinkage allowance at full percentage for whole dressed hogs shipped out immediately and for 70% of the product which was transferred to other departments and never reached the sales cooler at all.

This left theft as the only reasonable explanation of all the theoretically possible reasons which respondent claimed could have produced the shortages (30a, 68a, 69a, 78a, 84a, 113a-114a)

The Court of Appeals likewise made reference to a statement by petitioner's accountant Hadeler with respect as to what *could* be

the source of shrinkage in a certain week of 4800 pounds. This was in answer to a leading question of respondent, and the context shows plainly that Hadeler was referring to *theoretically* possible grounds, not *actual* grounds for the shrinkage (18c, 19c).

Also, in its discussion of the so called inventory shortage evidence, and as a further ground for its low opinion of its reliability, the Court of Appeals referred to the testimony of respondent's accountant. Certainly, the jury would not have had to believe that witness' statements in view of his demonstrated bias and self contradictions as shown by the record, even within the limitations of the trial judge's refusal to permit petitioner reasonable latitude in cross-examining him. Indeed, the jury plainly showed that it did not believe this witness by its answer to the only question it was permitted to decide involving his testimony. He had claimed that the appellant had withheld from him certain papers, books, vouchers and records, but in answer to a special interrogatory in the special verdict as to whether that was so, the jury flatly answered "No" (14a). This is a strong indication that had the jury been permitted to decide questions of creditibility on the subject of "inventory shortage" evidence and records, as between respondent's accountant and petitioner's witnesses the jury would have found in favor of the latter.

The reliability of the inventory shortage evidence, the weight to be given it and the credibility of the witnesses were all matters within the jury's province. Petitioner's witnesses had stoutly maintained that the records were accurate, complete, and showed the disposition of all product in the honest course of business. The jury had the right to believe them and accept their evidence.

It is most respectfully submitted that the Court of Appeal's comments on this evidence were not justified, invaded the province of the jury, and served only to cloud its opinion, making it more difficult to determine just what it was deciding.

APPENDIX B

ORDER DENYING REHEARING

(Filed: October 12, 1957)

The above cause coming on to be heard on appellant's petition for rehearing, and the court having requested appellee to file a reply to the petition, and appellant having thereafter filed an answer thereto, it appears that counsel for appellant ably presented the evidence and tried the case in the district court; that the result, adverse to appellant, was in no way due to any failure on the part of its counsel to exert the utmost care and effort on its behalf; and after consideration of the arguments set forth in the petition for rehearing, the reply of appellee, and the answer thereto, and the court being duly advised.

Now, therefore, it is ordered, adjudged and decreed that the petition for rehearing be and is hereby denied.

OPINION OF UNITED STATES COURT OF APPEALS

For the Sixth Circuit

(Decided June 25, 1957)

Before McALLISTER, MILLER and STEWART, Circuit Judges.

McALLISTER, Circuit Judge. The Sucher Packing Company brought suit against appellee insurance company to recover on a policy, indemnifying against loss resulting from larceny and theft by employees and any inventory shortage which the assured should conclusively prove to have been caused by dishonesty or fraud on the part of any of its employees. The case was tried before a jury, which brought in a special verdict. Appellant had sought a judgment in the amount of $146,370.57; the jury awarded $83.00.

On appeal, The Sucher Packing Company makes numerous claims of error, contending that the trial judge erred in excluding from the consideration of the jury specified records of appellant company; in restricting recovery of damages to certain losses; in submitting a form of special verdict to the jury; in directing a reading to the jury by the court stenographer, of the entire testimony of appellee's principal witness, as embodying a substantial part of appellant's claim; and in various rulings upon the admission or exclusion of testimony.

It is submitted by appellant that when The Sucher Packing Company was acquired in 1945 by a group of investors headed by Arthur Beerman, it was a successful business, and continued its profitable operations during the first part of that year, but, thereafter, began to suffer large and unaccountable losses, which continued until 1950. Appellant claims that it used many methods of attempting to ascertain the reason for such losses, including the installation of modern business record machines; the checking on weights of meat as it was processed in one place in the plant, and moved to another; blocking of unnecessary openings within the plant, and from the plant to the exterior; hiring extra guards; and employing various squads of detectives. On certain occasions, employees were found pilfering meat and were immediately discharged, but these instances were not considered of any moment.

The great losses, however, according to appellant, still continued until, on September 11, 1950, Superintendent McConkey noticed a new barrel being used on the trash truck, which was backed up to the loading dock. As only old barrels were used for trash, this incident aroused Mr. McConkey's suspicions, with the result that he inspected the contents of the barrel, and, when he looked into it, found smoked hams under a layer of trash, and also discovered fresh shoulder butts concealed in papers on the floor of the truck. The trash truck driver, William Har-

ris, was then held for investigation; and, upon questioning, he implicated four other employees, James Jackson, Robert Maiden, Helen Hurt and Willie Early. William Harris and James Jackson were arrested, pleaded guilty to grand larceny, and were sentenced to terms of imprisonment. As to Robert Maiden, Helen Hurt and Willie Early, the jury in the instant case absolved them from any acts of dishonesty, and found that no losses to appellant had resulted from any action on their part, acting either alone or in collusion with anyone else. The jury further found that William Harris and James Jackson, together, had been guilty of stealing hams, shoulders, and bacon from appellant. A most important finding by the jury in its special verdict was that there was insufficient evidence to determine any estimate of the number of pounds of hams, shoulders and bacon that had been stolen by Harris and Jackson. The method by which the jury arrived at a verdict of $83.00 in favor of appellant was as a result of finding, on the admission of the insurance company, that appellant had sustained a loss of $291.00 as a result of the thefts of Harris and Jackson, and that appellant had withheld wages owing in the amount of $208.00. Subtracting the wages withheld from the losses suffered by appellant, gave the amount of the verdict returned.

Harris, who confessed to the theft, testified as appellant's witness and stated that he had been stealing from appellant for two years. It was appellee's contention that appellant suffered no large losses as a result of thefts by employees and that Harris had been employed for only a comparatively brief period. Accordingly, on cross-examination, Harris was confronted with a statement that he had made to a detective at the time of his arrest, in which he had confessed that James Jackson "had got him to stealing hams" about three weeks before his arrest. To explain the conflict in his testimony that he had been stealing from appellant for two years, with the prior statement made to the detec-

tive that he had been stealing for three weeks. Harris stated that he meant that he had been hauling for only three weeks, instead of having been stealing for only that length of time. It was for the jury, however, to determine from the evidence whether Harris had been stealing from appellant for two years or for only three weeks. In this regard it is to be noted that Harris had testified that Helen Hurt, Willie Early and Robert Maiden were "involved" in the stealing. The jury, as mentioned, found these three to be innocent of any dishonest action, and the conclusion is inescapable that the jury attached no value to the testimony of Harris and disbelieved practically all of his testimony with regard to the time during which he had been engaged in stealing from appellant, the amount of meat that had been taken by him, and the persons he testified were involved with him.

The complaint, filed by appellant, and the numerous amended complaints subsequently filed, embodying its changing contentions during the trial of the case, foreshadow the uncertainties of appellant's claims and proofs. On September 2, 1952, the complaint was filed; thereafter, an amended complaint, and a second amended complaint were filed. The second amended complaint was amended during the trial, and thereafter again amended during the last day of the trial. The amended complaints withdrew claims of losses by theft of beef and veal from $9,620.91 to no loss whatever, of loss by theft of sausage from $12,546.74 to $10,392.74—and subsequently the claim for loss from sausage was entirely withdrawn, and, finally, complainant made an allowance for meat consumed by its employees in its cafeteria which had previously been claimed as a loss by theft. Copies of the same exhibits, twelve in number, were given by appellant to the members of the jury, in order that they could follow the testimony. These exhibits were found to contain such errors that the copies were withdrawn and

collected from the jury, and replaced by other exhibits in the hands of the jury, which were subsequently found to contain such errors, while the items were being explained to the jury, that they were also withdrawn and collected from the jury, and others submitted in their place. We refer to the foregoing as characteristic of errors and uncertainties in appellant's changing claims and proofs that took place during the trial.

It may here be remarked that appellant could not prove what part of its claimed loss took place in 1948, or what part in 1949. While it claimed that a loss amounting to $146,370.57 was due to theft, it could give no idea when during this entire period the alleged thefts occurred.

Appellant had first claimed in its complaint damages as a result of thefts of beef, veal, sausage, smoked pork and fresh pork. As to beef and veal, counsel admitted in open court that appellant could not prove such losses by theft. So beef and veal were withdrawn from the claim.

Harris testified that pork loins and sausage had been stolen by others without any certainty in amount or specification of names, but he stated that he never took anything but hams, shoulders and bacon. As a result of his testimony, counsel for appellant stated to the court: "Sausage may be eliminated as the testimony of Harris with respect to sausage is too indefinite. So the case is now restricted and confined to fresh pork and smoked pork."

Moreover, appellant, in addition to claiming that the insurance company should, according to the terms of the policy, indemnify it against loss "through theft, larceny, embezzlement, misappropriation, wrongful abstraction or fraudulent act or acts committed anywhere, by any of the employees, acting alone or in collusion with others," also claimed indemnity for "that part of any inventory shortage which the assured shall conclusively prove to have been caused by dishonesty or fraud on the part of any of its employees."

However, the proof of inventory shortage, although it appears to have been the principal part of appellant's case, was so deficient, contradictory, and worthless from the standpoint of evidence of conclusive proof of "inventory shortages caused by dishonesty of employees," that appellant, in its requested instructions to charge the jury, stated that "plaintiff is not claiming an inventory shortage . . . Under such circumstances, the portions of the policy with respect to the proof required of inventory shortages are not applicable."

The policy of indemnity insurance, as heretofore remarked, limited the insurance company's liability to $20,000 for each employee and to $20,000 for losses caused by unidentifiable employees, as well as inventory shortage conclusively proved to have been caused by dishonesty on the part of any of the employees. Appellant asked a judgment of $146,370.57, claiming, apparently, $20,000 for thefts of five employees, and the balance for thefts of unidentifiable employees and inventory shortage, caused by theft. However, at the close of the proofs, appellant submitted nine requests for special instruction to the jury, and, although it requested, in certain of them, instructions as to liability, specifically, for losses caused by the dishonesty of identifiable employees, in none of them did it request the court to charge on the liability of appellee for losses caused by the dishonesty of unidentifiable employees.

Before argument, the trial court stated that it would withdraw from the consideration of the jury appellant's claim for damages for losses sustained by dishonesty of unidentifiable employees. No objection to this action of the court was made by appellant, at that time, or after the charge to the jury, as is required if the question is to be saved for review. It is too late on appeal to complain of the action of the trial court in this regard. Moreover, it would appear from his argument to the jury that counsel

had, without objection, at least implicity, concurred in the court's withdrawal of the issue. At no time was anything said that would indicate counsel was going to rely upon the action of the court, in withdrawing the issue of losses sustained by dishonesty of unidentifiable employees, as reversible error. In his argument to the jury, counsel stated that "We are limited to only those five employees who have been identified, and I think Early was in the ring only a short period, and all we are entitled to is $20,000 for each of the employees who acted alone or in collusion with others, so that our maximum recovery cannot exceed $100,000 under the terms of the policy, even though our losses may have been considerably greater. But for the ring, four employees, during the period that they acted, we are entitled to recover at least the $80,000, and I submit, frankly, I don't believe that while Willie Early was a member of the ring, there was as much as $20,000 taken. He was a member for too short a period." This was a drop of $66,000 from the claim of $146,000 upon which appellant insisted at the trial until the arguments. The general nature of the uncertain method by which appellant's claim was sought to be proved, is evident from the argument as to Willie Early. Counsel did not think Early was a member of the ring, while as much as $20,000 worth of meat was stolen; but we are not told whether appellant's claim, as to Early, amounted to $1.00 or some amount approximating $20,000.

Appellant now claims that Harris stated specifically that he saw other unidentified employees take pork loins and sausage, and refers to this testimony as proof of theft by "unidentifiable employees," in the language of the insurance policy. But he only testified that he saw other employees take pork loins—not unidentifiable employees; and even this is indefinite, with no names, nor amounts taken. With this fragment of evidence as to unidentifiable em

ployees, it would be easy to understand appellant's abandonment of that phase of its claim.

The foregoing, then, discloses that appellant first withdrew all claims for losses by theft of beef and veal, because it could not prove them. It then withdrew all claim for losses by theft of sausage, because it could not prove them. It then, in effect, withdrew all claims for losses by theft caused by unidentifiable employees as a class, because it could not prove them. It finally withdrew all claims for inventory shortage caused by dishonesty of employees, because it could not prove them. Its final claim was limited to losses allegedly caused by the theft of meat to the amount of $20,000 each, by Helen Hurt, Robert Maiden, Willie Early, William Harris and James Jackson.

The jury found in its special verdict, as above mentioned, that Helen Hurt, Robert Maiden and Willie Early had not stolen anything. As to William Harris and James Jackson, the jury found that while they had stolen pork meats, there was insufficient evidence to enable the members of the jury to make any finding as to the number or approximate number of pounds of meat stolen by them; and as to James Jackson, the jury found that his theft had occurred September 11, 1950; and, as to Harris, that his thefts had occurred between July 26, 1950 and September 11, 1950 — a period of between six and seven weeks. It is impossible that these two employees during such a short period, could have stolen more than a small amount of meat.

Upon an examination of the record, it is clear that the verdict of the jury was justified by the evidence. The jury obviously refused to give any credence whatever to the testimony of William Harris, except where it was not in dispute; and, as the trial court charged, the jury is the sole judge of the credibility of witnesses.

One of the chief claims of error made by appellant is that the district court excluded from the consideration of

the jury the records of appellant which it had introduced to show an inventory shortage. It was admitted by appellant, at the close of the proofs, that it was not claiming an inventory shortage, "caused," in the language of the insurance policy, "by dishonesty or fraud on the part of any of the employees." In keeping with appellant's proposed instruction setting forth that it was not claiming an inventory shortage, the trial court gave the following special instructions to the jury:

> "[In] your consideration of this case and endeavoring to arrive at a conclusion, you are not to consider the evidence of an inventory shortage.
>
> "I realize we have been here a number of days hearing evidence on the question of inventory shortage, and it is necessary that the Court hear all the evidence. It becomes necessary for the Court to determine as a matter of law, whether that presents a factual question which may be considered by the Jury.
>
> "So, the Court has determined, as I say, that in arriving at your verdict, you will not consider this evidence of inventory shortage. In other words, it cannot be used by you as any measure of determining any loss to the plaintiff."

Accordingly, exhibits taken from appellant's records showing the disposition of product through its plant, the detailed daily and weekly figures from three large packing cases of primary data, folders of Weekly Products Analysis Sheets, stock records, and the various computations made from the foregoing, as well as the exhibits offered on the same subject, were withheld and not submitted to the jury. This is claimed to be reversible error.

When the trial court instructed the jury that they were not to consider the question of inventory shortage in determining losses of appellant, this seemed to be in agreement with the recital in appellant's proposed instruction that it was not claiming an inventory shortage. Appellant now says, however, that the court's instruction on this point

constituted reversible error because it should have instructed the jury that it could consider the claimed inventory shortage, as corroborating direct evidence of appellant's loss by theft, or as stated in appellant's reply brief, "to assist [the jury] in determining the amount of appellant's loss." If the district court's instruction, in this regard, was erroneous, it certainly was not plain error, and appellant was obliged, in order to save the question for review, to except or object to it, in order to call the court's attention to any misstatement or oversight and to give an opportunity for correction. Counsel for appellant did except to the instruction, but in the following language: "Also, take exception at this time to the exclusion of the matter of the book figures which was the result of your Honor's earlier decision; in your instructions it was repeated, they were not to be considered in describing the inventory shortage." This, obviously, was not an objection or exception calling the court's attention to the claim now made by appellant that the books should have been admitted to corroborate proof of theft. The exception was that the books "should not be considered in describing inventory shortage." Appellant had informed the court in its proposed instruction that it was not basing its case on the theory of inventory shortage, and all that the court told the jury was that they could not consider evidence of inventory shortages in determining any loss to appellant. It would have been improper, after such an instruction, for the court to have charged the jury that it could consider the claimed inventory shortage in order to assist it in determining the amount of appellant's loss, as that would have permitted the jury to consider the inventory shortage as proof of loss to appellant by reason of the theft of employees, and appellant agrees that such proof, under the indemnity policy, must constitute "conclusive proof" of such dishonesty, which it conceded that it failed to adduce.

Appellant further submits that the district court at the outset of the trial, specifically stated that "exceptions are not necessary," thus seeking to justify any failure to except to the charge to the jury. The court's ruling, however, that exceptions were not necessary, was made with regard to exceptions during the progress of the trial. Formerly, counsel were obliged not only to object to such matters as rulings of the court on the admissibility, or nonadmissibility of evidence, but it was also required to except to the rulings of the court during the trial, in order to save the question for review. Such requirement has been discontinued. Rule 46 of the Federal Rules of Civil Procedure. However, it is still necessary to object or except to instructions of the court to the jury. Rule 51 of the Federal Rules of Civil Procedure. Thus it is seen that the remark of the court, that no exceptions were necessary, related to rulings during the trial, and had no application to the requirement that a party must except or object to the court's instructions to the jury in order to save the question for review. We fail to see where the court was in error in its instructions, or that any exception was made by counsel for appellant that would call the present claimed error to the court's attention, and we find no merit in appellant's contention in this regard.

Even if appellant had requested the court to charge that its records showing inventory shortage could be considered by the jury as corroborating the direct evidence of appellant's loss by theft—and had duly excepted to the failure of the court so to instruct—it is doubtful that the court's refusal to give such requested instruction could be considered error under the circumstances of this case. Plaintiff's proofs of inventory shortage, and the records and computations made by them for the purpose of such proof, are uncertain and deficient. As an instance, shrinkage, or loss of the weight of meat, was one of the principal items

with which the case was concerned. As testified by the superintendent of appellant company, "shrink' is one of the bugaboos of the meat industry. It depends on many factors. The conditions existing in a particular plant affects shrink, and among these factors are temperature, air-circulation, relative humidity in the cooler, position of vat covering, frequency with which the door of the cooler is opened and closed, removal or addition of hot carcasses and the type of breed of animal—whether lean or fat." Records for humidity and temperatures of appellant's plant during the critical years were missing, and apparently, no record was ever made as a result of any actual test of shrink at the plant.

Furthermore, when the accountant for appellee asked appellant company for the general ledger, general journal, journal vouchers, audit work papers, records covering temperature, humidity, changes of air, and circulation, they were not available. Appellee's accountant further testified that the product analysis sheets, upon which appellant so completely relied, contained round numbers and approximation of weights, that "product transfers-out" in round numbers, from fresh pork, affected the balance remaining, or supposed to be remaining, in fresh pork, that if the one item was wrong, the other would be wrong, that the use of round numbers was incorrect because it was not an exact weight, and the result would be that the amount of fresh pork remaining on hand would not be exact and accurate, that the product analysis sheets showed no allowance for any shrink, that the several million pounds of meat were held in inventory, during the critical years, for at least two days, in which there should have been additional shrink computed, but that none of these items were reflected on the product analysis sheets, that in none of the papers or records submitted by appellant was there any statement by any officials, employees, or counsel of appellant company as to any loss by shrinkage, mistake,

or theft, except in connection with the original chilling shrink; that lard appeared nowhere on appellant's exhibits, and that, as an accountant, it was impossible for him to take the records, and to trace out and say what should have been on hand.

There are multitudinous errors and uncertainties in appellant's records and its proofs of inventory shortages. As an instance, for the week ending October 1, 1948, there was a shortage of pork of 18,245 pounds, which was unexplained. It was claimed that if an error was made, it would straighten itself out in the following week, but, on October 8, 1948, the next week, the shortage was 14,313 pounds, which, the vice-president of the appellant company said, no doubt, caused a lot of concern. For the week ending June 11, 1949 there was a shortage of 16,555 pounds of meat, which no one could explain. It was not claimed that more than 8 tons of meat were stolen during that week. For the week ending July 2, 1949, there was a gain of meat, on the records, in the amount of 6,000 pounds, although nobody had brought that amount of meat to appellant's plant. On October 22, 1949 there was a shortage of 1,811 pounds of sausage, but the plant officials did not think that any of the employees had stolen it. When appellant's claim was first submitted to the jury, appellant had forgotten to deduct from its claim of stolen meat, a large amount that had been supplied and consumed by its employees, in appellant's cafeteria. As to the claim that when a shortage appeared on the books, it indicated a theft, on one of the inventory statements it appeared that there had been a shortage of 5,544 pounds of offal in a certain period. Yet no one claimed that anyone was stealing offal. In view of appellant's claim that Harris, Jackson, and the ring were responsible for the great losses suffered by appellant as a result of their thefts, a remarkable circumstance is seen in the shortages after Harris and

Jackson were arrested, and the others dismissed. When it was then assumed that the cause of shortages had been found, and those responsible arrested or discharged, it appears from the work-sheets of the certified public accountant, employed by appellant to determine the extent of unexplained losses, that on September 16, 1950, the week after Harris had been arrested, the shortage for that week was 11,000 pounds. On September 25 there appeared a shortage of 3,700 pounds and on September 30, 6,600 pounds—none of which could be attributed to thefts by Harris, Jackson and "the ring." It seems significant that Mr. Hadeler, the accountant employed by appellant to determine the extent of the unexplained losses, testified that: as an example, an item of shrinkage of 4,800 pounds in a certain week could come either from errors in transfer or in taking the inventory, an additional shrinkage because the meat had stayed too long in storage, or through spoilage; or, finally, from theft.

In spite of all the complications in the proofs, the trial court summed the case up tersely and clearly when, in a colloquy with appellant's counsel, he said that the question of losses was one that was capable of mathematical demonstration to the jury or anyone else, and depended on accurate inventories at the beginning, accurate inventories at the end, and the accuracy of incoming and outgoing items.

The records contained too many errors, uncertainties and approximations to enable a jury to draw any conclusion except unwarranted speculation, from them, in arriving at an inventory shortage conclusively proving losses caused by the dishonesty of employees. The claimed inventory shortages would seem to be equally valueless to corroborate proof of thefts by individual employees. But, in view of what has heretofore been said, we are not obliged to pass upon this latter point.

With regard to appellant's claim of error, we find nothing objectionable in the court's submission to the jury of the form of special verdict. It was not subject to any valid complaint that the jury was required to find the specific details of damage with precision, as the jury was instructed that it was not necessary to find the amounts of the various items with perfect exactitude, or with precise mathematical calculation, but only that there must be some basis for computation that would reasonably afford them an opportunity to arrive at some figure that approximated correctness.

As to the direction by the trial judge to the court stenographer to read all of William Harris' testimony to the jury, as an introduction to his charge, we find no error. Three weeks of trial had elapsed since Harris had testified, and since appellant's case largely depended on the testimony of Harris, the trial judge, as he said to the jury, "in fairness to you, in order that you may be better able to understand the case and the charge and the work you will have to do," directed the reading of the entire testimony of Harris to the jury. We see no prejudice to appellant in this method of procedure of the trial judge.

Appellant further claims that the court was in error in not permitting a third person to testify as to what James Jackson admitted with respect to stealing from appellant, at the time he was arrested. Jackson was called as a witness by appellant, but refused to testify as to having admitted that he was guilty of stealing, on the ground of possible self-incrimination. Appellant then sought to prove by the third party that Jackson had admitted that he had been stealing from appellant, claiming that such a declaration on his part would be against interest, and therefore was properly admissible in evidence. The trial court held that Jackson was not a party to the case, and that it would have to be satisfied by some authoritative adjudication on

the point, before ruling in favor of appellant's contention. Failing, apparently, to be furnished with such authority, the court ruled that the testimony concerning the alleged statement made by Jackson to a third person, was inadmissible. Such ruling was consonant with the decision of the Supreme Court in *Donnelly* v. *United States*, 228 U. S. 243, where, however, there was a strong dissenting opinion by Mr. Justice Holmes, concurred in by Mr. Justice Lurton and Mr. Justice Hughes. It might well be, as appellant argues, that, in the light of adjudications during the 44 years that have elapsed since the *Donnelly* case, the views once voiced in the prevailing opinion in that case, would no longer hold, and a declaration against interest such as was here sought to be introduced, would be held admissible. Moreover, the rule in the *Donnelly* case may not be applicable to other than criminal cases, for a distinction has been drawn between statements subjecting the declarant to a criminal liability, and a statement against the declarant's pecuniary or proprietary interest, the latter kind of statement, in many cases, being considered admissible as a declaration against interest, while the former is not. Here, the alleged statement was against the pecuniary interest of the declarant, since presumably, he would be liable in a civil action for what he stole. Yet it would also be a statement which might subject him to criminal liability, and it is to be noted in this regard that Jackson refused to answer the question as to whether he had been stealing during the period in question, on the ground that his answer might be self-incriminatory. However, in the recent case of *G. M. McKelvey Company* v. *General Casualty Company*, 166 O. S. 401, decided May 29, 1957, it was held that where an insured brought a civil action against his insurer to recover for defalcation of employees of the former, and it appeared that such employees had been summoned, but had not been found in the jurisdiction, written and signed

confessions of such employees were admissible in evidence as declarations against interest as to both the fact and the amount of the loss. At the time of the trial, in the instant case, when the question as to the admissibility of such evidence arose, the trial court was well advised in requesting counsel for appellant to furnish him authority on the proposition. In any event, if it be assumed that it was error to hold as inadmissible the evidence that Jackson had told a third party that he had been stealing from appellant during the period in question, we do not consider that such ruling constituted reversible error in this case, in view of the evidence of all the various instances where the losses occurred; the many ways in which errors were made in computations by appellant; the deficiency in proof as to what was stolen, or how much was stolen; and the obvious refusal of the jury to attach any credit to appellant's evidence of losses of hundreds of thousands of pounds of meat by theft, by all the employees accused by appellant; for no error in the exclusion of evidence is ground for setting aside a verdict or for vacating a judgment, unless it is inconsistent with substantial justice. Rule 61 of the Federal Rules of Civil Procedure.

Other claims of error have been considered, but have been found without merit.

In accordance with the foregoing, the judgment of the district court is affirmed.